No. 10251

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIE JEFFCOT, his wife,
Appellants,

vs.

EDWARD J. DONOVAN,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Jurisdiction.

The statement of appellants, appearing on pages 1, 2 and 3 of their opening brief, is an accurate statement of the pleadings and facts upon which rested the jurisdiction of the District Court of Arizona, and of this Court upon this appeal.

Statement of the Case.

The statement of the case, as prepared by appellants and submitted in their opening brief, is substantially in accord with the evidence, but should be supplemented or clarified in some respects, in order that a narrative statement of the case be fairly and completely submitted to this Court.

Appellants' statement is supported by the evidence and is fairly inclusive of the pertinent material down to the

second paragraph beginning on page 6 of such opening brief.

The material submitted in appellants' statement, from about the middle of page 6 to the end of such statement, should be considered in light of certain additional facts of the case, if this Court is to have a fair and unbiased understanding of the situation below it.

It was not only first planned that the Jeffcott baby should be flown to New York for the needed operation, but all arrangements were made with Dr. Donovan to the end that he would see the baby in New York City on the following day, at Babies' Hospital, and that he would operate there [Tr. pp. 132-133].

About an hour later [Tr. p. 89] and having decided that to have the surgeon come to Tucson and there perform the operation would disturb the orderly routine of fewer people [Tr. p. 47] and that it should not cost substantially more to have the surgeon come to Tucson than to take the baby, with necessary attendants, to New York [Tr. pp. 86-87], the Jeffcotts instructed Dr. Thompson to again get in touch with Dr. Donovan by long distance and to prevail upon him to come to Tucson at once, there to perform the needed operation [Tr. pp. 46-47].

Up to such point in such negotiations, Mr. Jeffcott had made no effort to determine what Dr. Donovan would charge for such trip and the proposed operation [Tr. p. 132]. No such effort was made thereafter [Tr. pp. 93-94].

Before complying with Mr. Jeffcott's instructions, Dr. Thompson voiced some doubt that Dr. Donovan would see fit to make the trip to Tucson and asked Mr. Jeffcott whether money was any object in making such arrange-

ments [Tr. p. 134]. Dr. Thompson not only testified, as stated by appellants, that Mr. Jeffcott's reply was simply the one word, "No" [Tr. p. 161], but Mr. Jeffcott admitted, on cross-examination [Tr. pp. 87-88], that he could have been mistaken in his testimony, as to what he said in reply to Dr. Thompson's inquiry, and that his reply could have been simply "no."

The very pertinent fact omitted by appellants, in connection with such statement by Mr. Jeffcott, is that, when Dr. Donovan hesitated to decide to make the trip to Tucson, Dr. Thompson told him that the parents of the child, these appellants, had stated that money was no object [Tr. pp. 134, 158, 206, 249-250, 287], which representation he relied upon, possibly in deciding to make the trip to Tucson and certainly in determining what his charge should be [Tr. pp. 182, 250].

No true understanding of this case can be had unless such representation to Dr. Donovan be taken into account.

Toward the end of the paragraph, ending on page 7 of appellants' opening brief, there is a statement concerning the development, existance and condition of a ventral hernia of the Jeffcott infant.

Such statement has no proper place in this case.

Mrs. Jeffcott testified [Tr. p. 462] that a ventral hernia developed and that it would require an operation.

The record is devoid of any testimony whatever, to show, or even to suggest, that the Jeffcott infant ever suffered an incisional hernia, which is the only type of

ventral hernia which could have any possible connection with the operation in question [Tr. p. 551].

The only medical opinion appearing in the record, such being certainly of more value than the lay opinion of Mrs. Jeffcott, is to the effect that no operation will be needed for correction of this hernia [Tr. pp. 551-553], even if it be an incisional hernia.

In view of the extended effort of appellants to avoid paying the fee of Dr. Donovan, it can only be assumed that they certainly would have shown this hernia to be incisional, were such possible.

Since there is absolutely no proof that it was an incisional hernia and since it is reasonable to assume that no such proof was possible, mention of the ventral hernia cannot be regarded as being subject matter which, in fairness, should have any proper place within appellants' statement of the case.

In the paragraph beginning on page 7 of such opening brief, appellants state that Mr. Jeffcott testified that he had no opportunity to discuss fee with Dr. Donovan prior to or immediately following the operation.

While it is correct that Mr. Jeffcott did so testify, there is evidence that Mr. Jeffcott made no inquiry concerning the cost of such trip and operation, prior to Dr. Donovan's departure for Tucson [Tr. pp. 93-94, 132], and Dr. Donovan testified that Mr. Jeffcott had ample opportunity to discuss the matter of fee with him at Tucson [Tr. pp. 245-247].

Argument.

Appellants have opened that portion of their brief which they entitle "Argument" with the indication that the principal basis for their appeal is their belief that the trial court awarded too much money to Dr. Donovan, the appellee, as the plaintiff below. (See App. Br. p. 21.)

Appellants indicate, in the introductory portion of their argument, that their prime hope for appellate relief in this case rests in the difficult proposition of prevailing upon this Court, upon its review of the cold and inanimate record, to assume that it is better qualified to determine the issues of fact than was the trial court, which had the opportunity to hear and observe the witnesses.

This proposition, which seems to be the meat of the position of appellants before this Court, will be discussed further herein, following an orderly discussion of the sundry propositions advanced by the brief of appellants.

Appellants, beginning on page 21 of their opening brief, state that counsel were in agreement, at trial, on the proposition that the modern trend of authority is away from the conflict which exists on the rule or theory that evidence is admissible to show financial ability of a patient to pay for the services of a physician or surgeon.

Such statement is correct and the authorities, cited by appellants on page 22 of their brief, may be taken to indicate such trend.

Appellants, however, cite no case, and none has been found by counsel for appellee, to hold or indicate that a physician or surgeon must prove the financial ability of a

patient to pay, in order to make out a *prima facie* case in an action of this class.

Appellee agrees that a physician and surgeon may consider ability of his patient to pay, in deciding what charge he should make, and may show such ability in an action brought to recover his fee, but appellee does not concede, to any extent, that such a litigant must show such ability, particularly in a case which involves a fact situation such as the one now before this Court.

The authorities, cited by appellants as mentioned above, do hold that ability to pay may be properly shown in actions similar to this.

Such authorities, however, are practically ample authority, by themselves, to indicate the duty of this Court to affirm the judgment of the District Court, as appellee will point out in detail in the course of this brief.

I.

This division hereof is addressed to appellants' Specification of Error No. I [Tr. pp. 8-9] and to division No. I of their "Argument," appearing on pages 23 and 24 of their opening brief.

Such Specification No. I contains three separate and distinct assignments of error, all concerning Finding XXVIII, made by the trial court.

The first of such assignments is that such finding infers a legal obligation, on the part of the parents of David C. Jeffcott to advance money and to pay for the services of Dr. Donovan.

It is difficult, indeed, to discover, within Finding XXVIII, any justification for such contention on the part of appellants.

The transcript of testimony is full of indications that the Jeffcotts defended this action upon the novel and wholly untenable theory that they should be relieved from responsibility to Dr. Donovan upon showing that they were without "net annual income."

Appellants defended this action upon the fallacy that having ability to pay and having net income are synonymous.

Their defense involves only these propositions, namely: (1) that their ability to pay should be measured only in terms of annual income; (2) that Dr. Donovan was obligated to determine his fee on the basis of taking a percentage of their net annual income; and (3) that, since they had no net annual income at the time the operation was performed, Dr. Donovan had no right to any fee beyond that sum which they had paid him in order to "free our consciences," as Mr. Jeffcott put the proposition [Tr. p. 13].

The appellants defended this action on the highly unreasonable theory that they might be worth a million. but that they would be without ability to pay, in the eyes of the law, just so long as such wealth was used in some manner which would not produce for them some net annual income.

This defense theory is conclusively apparent throughout the entire testimony on behalf of the Jeffcotts.

Some of the particular instances are as follows:

The whole of Mr. Jeffcott's testimony concerning his worth and income [Tr. pp. 418-438];

The statements of his counsel [Tr. p. 434];

The cross-examination of Dr. Donovan [Tr. pp. 239-240, 242];

Defendants' Exhibit A [Tr. p. 23];

The hypothetical question propounded by appellants to Dr. Carrell [Tr. pp. 472-473]; and his testimony [Tr. pp. 474-475];

The testimony of Dr. Gore, as to his practice of determining a fee upon the basis of income [Tr. pp. 490-492]; and the hypothetical question propounded to him [Tr. pp. 493-495];

The hpoythetical question propounded to Dr. Holbrook [Tr. pp. 522-526], with particular attention to page 526; and

Appellants' Requested Finding I [Tr. pp. 40-41].

The Court will observe, from such portions of the record, that the Jeffcotts adhered constantly to the theory that they were not liable to Dr. Donovan because of the fact that they had no net income at the time he operated upon and saved the life of their child.

Dr. Donovan, as plaintiff below, proved that the Jeffcotts, in negotiating his employment to leave his practice at New York and to fly to Tucson, there to operate on their infant son, represented that money was no object [Tr. p. 134; p. 47]; that Mr. Jeffcott at no time discussed the matter of fee with him [Tr. pp. 93-95; 245-246]; that there were no indications of concern on the part of the Jeffcotts about expense [Tr. p. 249]; and

that Mr. Jeffcott admitted the worth of the defendants to be approximately $100,000.00 at or about the time of the operation [Tr. pp. 8-10].

Dr. Donovan then elected to rest his case, as to the point of the ability of the Jeffcotts to pay his fee.

The Jeffcotts then presented their defense on the point of their ability to pay, such defense being along the line previously mentioned and being indicated by the previous references to the record.

Following receipt of all of such testimony and documentary evidence, concerning ability to pay, the trial court was called upon to make findings of fact.

When a draft of proposed findings was prepared and submitted to the trial court, pursuant to its rules, the matter of such financial ability was covered by proposed findings, numbered XXIX and XXX [Tr. p. 33], to the effect that the Jeffcotts, at the time of employing Dr. Donovan, were of substantial worth and that, for the year 1939, during which the operation in question was performed, their personal expenditures exceeded fifteen thousand dollars.

The Jeffcotts thereupon objected to such proposed findings [Tr. pp. 37-38] and requested that the trial court, in lieu thereof, find substantially those ultimate conclusions which are found within Finding XXVIII [Tr. pp. 40-41; 51-52].

Appellants do not and could not complain as to the form of Finding XXVIII, since it is in substantially the form which they requested.

The substance of Finding XXVIII consists of a series of conclusions, drawn from and wholly supported by the testimony of Mr. Jeffcott [Tr. pp. 23; 418-438].

A reading of Finding XXVIII will clearly show that it contains nothing which is even suggestive of supporting appellants' specification of error, appearing on page 8 of their opening brief, that "it infers a legal obligation on the part of the parents of the defendant, David C. Jeffcott, to advance money and to pay for the services rendered by the plaintiff,".

Appellants have failed to refer to anything within the record, other than said Finding XXVIII, which they claim to support their contention in regard to such specification.

Appellants, on page 23 of their opening brief and referring to financial assistance which David C. Jeffcott was shown to have received from his father, make the following statement:

> "Throughout the transcript of testimony it will be seen that the court seemed to consider this as a 'source of income' for said David C. Jeffcott and placed undue emphasis upon the fact that Mr. Jeffcott was able to borrow money from his parents * * *."

This may only be regarded as a bare and unsupported statement by counsel, since not one reference is given to any portion of the transcript of testimony or to other parts of the record where such consideration or undue emphasis by the trial court may be found.

Appellee believes and submits that such statement is not supported by reference because such reference is impossible.

Appellants further argue, if their unsupported statement may be properly classed as argument, that Finding XXVIII "casts an inaccurate and prejudicial appearance on the financial condition of the appellants on the date when appellee rendered his services."

It is difficult to understand how such bare statement can prove to be of interest or aid to this Court.

Mr. Jeffcott's summary of financial totals, taken from his books [Tr. pp. 23; 429-430] and the whole of his testimony concerning his financial ability to pay [Tr. pp. 418-438] clearly support each and every finding included by the trial court within its said Finding XXVIII. The court merely found the conclusions, predicated wholly upon Mr. Jeffcott's testimony, as to the source and extent of his property holdings, as to the amount and nature of encumbrances thereon, as to the expenditures made by him, during the period of time covered in his testimony, for operation of his ranch and for what he classed and described as "personal expenditures", and as to the fact that, during such period of time, he had had no net income from his ranch property.

All of such conclusions of fact, clearly supported by such evidence, tend to indicate the state of financial ability of the Jeffcotts.

The casting of inaccurate and prejudicial appearance, mentioned by appellants, is not apparent.

Appellants also suggest, in subdivision I of their argument and on page 24 of their opening brief, that some

form of prejudicial error was committed by the trial court including in Finding XXVIII a statement of the approximate total of the personal expenditures of the Jeffcotts for the years 1938 to 1941, both included [Tr. pp. 23; 418-438].

The testimony of Mr. Jeffcott, above referred to, shows that his financial condition, without regard to net annual income from his business, during such four years, was such that he and his wife made personal expenditures in excess of forty thousand dollars.

The trial court included such ultimate fact within its findings.

The reason for such inclusion is obvious. The fact that a man and wife are in such financial condition as to permit them to make personal expenditures exceeding $40,000.00 in four years, regardless of the source from which expended, tends strongly to indicate ability to pay. The ability to make such expenditures, as well as the spending, contributes materially and pointedly to the financial picture of the Jeffcotts. The purpose for which such expenditures were made could add nothing whatever to such picture.

Certainly, the trial court had the right to take into consideration all of the evidence introduced by the Jeffcotts concerning their financial condition. Certainly, the extent of their expenditures bears upon their ability to pay. How, then, can it be possible that they suffered any when, without detailing the nature of the expenditures, the Court found that their personal expenditures, as Mr. Jeffcott testified, exceeded forty thousand dollars?

II.

Specifications of Error, numbered II, III and IV [Tr. pp. 9-10] are that the finding, conclusion and judgment of the trial court, awarding to the plaintiff below the sum of $7,500.00 less the $2,500.00 paid by defendants below, were erroneous on the ground that the award was excessive and unreasonable.

Division II of appellants' *Argument,* pages 24-28 of the opening brief, and this division hereof are both devoted to the matters having to do with such Specifications of Error.

Appellants first advance the argument that the award was excessive and unreasonable because it was disproportionate to other fees charged by Dr. Donovan for similar operations.

In the first place, appellants overlook the fact that the record discloses that Dr. Donovan had never performed any operation for volvulus of the newborn which can be taken fairly to have been done under circumstances similar to those which prevailed in connection with the Jeffcott operation.

Dr. Donovan carried on his practice as a surgeon wholly in New York City, from his admission in 1921 to the performance of the operation in question [Tr. p. 164]. The eighteen operations for correction of volvulus of the newborn, mentioned by appellants, had been performed in New York City, where Dr. Donovan had his offices and his practice. When the Jeffcotts decided, to the end that the orderly routine of less people be disturbed [Tr. p. 47, Finding XIII] and by representing that money or expense was no object [Tr. p. 47, Finding XI], to prevail upon Dr. Donovan to come to Tucson, Arizona, by air, which

required that he leave his practice abruptly and travel some six thousand miles [Tr. pp. 241; 46-49, Findings X-XX] in order to serve the Jeffcotts, the operation in question immediately fell into a class, as to surrounding circumstances, entirely apart from such eighteen operations [Tr. p. 249].

The cross-examination of Dr. Donovan [Tr. p. 276] brings this situation out with particular clarity, in the following manner, namely:

> (Cross-examination by Mr. Robertson, of counsel for the Jeffcotts):
>
> "Q. Did you take into consideration, doctor, the realization of the expense that Mr. and Mrs. Jeffcott were required to incur in connection with the charges of the doctors here, Dr. Carrell, Dr. Tappan and Dr. Thompson, the hospital and the expenses of the nurses? A. No, sir, that was not my concern at all.
>
> Q. And the fact that they may have incurred some three thousand additional expense did not enter into your consideration at all? A. No, sir.
>
> Q. The only way it might have affected your consideration would have been for you to increase the amount of your fee, realizing that they were spending that much money. Is that true? A. No, sir, it had no effect whatever upon my fee. My fee was special for operating on a baby six thousand miles away.
>
> Q. Six thousand miles away from where? A. Six thousand miles away from me—Well, three thousand miles away from me—and saving the baby's life, traveling six thousand miles to do it—special.
>
> Q. You would not have done it for twenty-five hundred dollars? A. I would not."

While the cross-examination of Dr. Donovan as to what he would have charged for this operation at New York [Tr. pp. 225-228; 233-239] was not objected to, since it may have been entirely proper on the theory that understanding of such hypothetical situation may have thrown light on the question as to what portion of his demand was to cover the special aspects incident to coming to and performing the operation at Tucson, Arizona, such information throws little or no light upon the issue of what constitutes the reasonable value of Dr. Donovan's services, performed, as they were, under arrangements which required him to hurriedly depart from and temporarily abandon his practice, to fly to Tucson, to perform the operation there, to remain in post-operative care as needed and, then, to return to New York City.

In the second place, the fact that Dr. Donovan might have made lesser charges for operations involving volvulus of the newborn, can throw no light whatever upon the determination of what constitutes a reasonable fee to be allowed for his operation upon baby Jeffcott.

A physician is not bound by his customary charge.

Pfeiffer v. Dyer, 145 Atl. 284, 295 Penna. 306.

In this case, which is cited by appellants at page 22 of their brief, the Court held as above stated, and, at page 285 of its decision, made the following statement:

> "Appellant's able counsel in the second branch of his argument advances a somewhat novel and startling

proposition as to the fees of a professional man, that 'a surgeon, without any agreement as to the amount of his fee, may not recover a fee based on what other surgeons would have charged *or think proper,* which fee is admittedly more than his own customary charge for the particular service,' which would mean that a physician, once having fixed his fee for a given service, never could increase it, or that the modest surgeon, who has been a modest charger and who has attained great skill, could not in a proper case receive the fair compensation to which others also of high professional standing believe him entitled. We would hesitate long before subscribing to such a rule, particularly in view of the services rendered by physicians to the afflicted without thought of compensation, customary or otherwise, of which plaintiff's own experiences are, we think, a fair sample. Pressed on cross-examination to state his customary fee for such an operation as that here involved, he said that in over twenty years of experience in surgery he had performed the operation six times, three times for nothing, and in explanation added that over half of his professional work was done for charity. This state of affairs the law must recognize, that physicians should not have their services valued, as you would commodities in trade, by a fixed standard; what would be a proper charge for the same service to a man fully able to pay would be excessive to a man of limited means, and what would be willingly done for the indigent, without thought of financial reward, should be compensated for by one who can afford to pay on the scale which doctors of repute measure as the proper one. Only on such a basis can those who devote their lives to ministering to human suffering in some degree be fairly paid."

The same rule of law is recognized and stated in another of the cases cited by appellants, such being

> *Citron v. Fields,* 85 Pac. (2d) 535, 30 Cal. App. (2d) 51,

wherein the appellate court of California laid down the rule, during 1938, in the following language, namely:

> "A physician is entitled to recover ordinary and reasonable charge for such service, as he has rendered, by members of the same profession of similar standing."

The testimony of Doctors Downes, Burdick and Beekman, indicating them to be surgeons of standing similar to that of Dr. Donovan, was not contradicted.

Dr. Downes testified that the reasonable value of the services of Dr. Donovan, rendered to the Jeffcotts, amounted to between $12,000.00 and $15,000.00 [Tr. p. 326]. Dr. Burdick testified that such value was between $10,000.00 and $15,000.00 [Tr. p. 360]. Dr. Beekman testified that such value was between $10,000.00 and $15,000.00 [Tr. p. 404].

Appellants proceed to "submit", on page 25 of their opening brief, that the award of the trial court should be deemed excessive because it constituted one-fourth of the net annual income to Dr. Donovan for the year 1939, during which year the operation in question was performed.

Appellants cite no authority to support such thought on their part.

The reason would seem obviously to be that there could be no authority for such contention.

The issue before the trial court was the determination of what constituted a reasonable charge for Dr. Donovan's particular service, in issue in such case, under the circumstances shown to have prevailed concerning the same.

It is unquestionably correct and logical that a fee of $7,500.00 could and would have been reasonable for the operation in question had Dr. Donovan made no charge whatever for all other professional services rendered during 1939.

It is also correct that Dr. Donovan would not have been permitted to claim that his demand of $12,500.00 was reasonable because it constituted only one per cent of his net annual income for 1939, assuming that such income had been in the sum of $1,250,000.00 instead of the amount which he testified.

The fact stands out that the reasonableness of Dr. Donovan's fee and his annual income for 1939 are and must remain two wholly unrelated matters.

Appellants also advance the argument, on pages 25 and 26 of their opening brief, that the fee awarded to plaintiff is excessive in view of the financial condition of the Jeffcotts.

In support thereof, appellants comment that the trial court found [Tr. pp. 51-52] that the Jeffcotts, at the time of such operation, were worth approximately $80,000.00 net, but here, again, appellants continue in their unsound theory that they were without financial ability to pay because they were without net annual income, regardless of net worth.

Most of the cases cited by appellants on page 22 of their opening brief, as indicating the modern rule that the courts in cases of this type may consider the financial ability of the patient to pay, show conclusively that the courts do not regard that the having of "net annual income" is to be considered to the exclusion of consideration of financial worth without income.

That ability to pay is not measured only by net annual income, is indicated by the following cases, to-wit:

In Succession of Levitan, 79 So. 829, 143 La. 1027, 3 A. L. R. 1646;

Citron v. Fields, 85 Pac. (2d) 535, 30 Cal. App. (2d) 51;

Houda v. McDonald, 294 Pac. 249, 159 Wash. 561;

Young Bros. v. Succession of Von Schoeler, 91 So. 551, 151 La. 73;

Lange v. Kearney, 4 N. Y. S. 14, 51 Hun. 640.

In the latter case, the Court's opinion on such point is found to be as follows:

> "It must be further observed that, although the sum demanded by the plaintiff seems to be large in contemplation of the defendant's income, nevertheless it appears that he is the owner of property, and, although it may embarrass him, or subject him to inconvenience, he can pay it—he has the ability to do so. It may be justly said that the plaintiff saved the life of the defendant's son, and by a master performance, which united skill, knowledge and experi-

> ence, without which it could not have been done. The exceptions are valueless. * * * The measure of compensation must be controlled more or less by ability, in all the professions, and the service rendered by its responsibilities and success."

The record of this cause, now before this Court on appeal, will indicate to a high degree that the above-quoted opinion could well be used in disposing of this case.

The appellants then proceed, on pages 26 to 28 of their opening brief, to argue that it is evident, from the size of the fee awarded, that the trial court was influenced by evidence concerning the financial condition of the parents of defendant, David C. Jeffcott.

The weakness of this contention by appellants is typified by the statement, appearing on page 27 of the opening brief, that "It is difficult to point out this assertion by specific examples, as the cold, written text of the transcript of testimony cannot portray the tone of voice and attitude of the court."

Such excursion beyond the record should not merit consideration by this Court under any circumstances.

Appellee, however, wishes to point out just to what extent there is no justification for the assertion of appellants that "A reading of the transcript of testimony will show that the Court's attitude was completely reversed from and after the time when this testimony came into the trial."

The transcript, on pages 81 and 82, indicates that, counsel having announced themselves as being ready to proceed with the trial, Mr. Jeffcott was called by counsel for appellee for cross-examination under the rule.

The Court first spoke, when appellants objected to the form of a question and were overruled [Tr. p. 86].

The next exhibition of the "tone of voice" of the trial court came, following a colloquy between counsel, when the court directed Mr. Jeffcott to answer as far as possible within his knowledge [Tr. p. 90].

Thereafter, the Court spoke a few words, as follows:

"Speak louder, Mr. Jeffcott, I have difficulty in hearing you." [Tr. p. 94];

"It may be admitted and marked." [Tr. p. 96];

"What is that, Mr. Witness?" [Tr. p. 97]; and

"Any objection to it Mr. Robertson?", "It is admitted.", "If there is any occasion to read it, you may do so." and "Go ahead." [Tr. p. 98].

The Court was not called upon to and did not thereafter speak until counsel for appellants made objection to cross-examination of Mr. Jeffcott concerning his parents [Tr. pp. 99-100], where there is transcribed the following examination and remarks, namely:

"(Cross-examination of Mr. Jeffcott:)

"Q. How many children in all do you have? A. We now have three.

Q. The first two were girls? A. Correct, sir.

Q. And this— What is your father's name?" A. My father's name is Robert Crawford Jeffcott.

Q. And this son of yours, Robert Crawford Jeffcott, is your father's first grandson, isn't that correct? A. Yes, sir.

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

Mr. Robertson: I object to the grandfather—

Mr. Allen: The child was named for him.

Mr. Robertson: I happen to have one named for me, too. The grandfather is not a party to this litigation.

The Court: Unless you make a showing as to the materiality, it is not admissible."

Thereafter and immediately following such remarks by the Court, the matter was discussed by counsel and the Court, counsel for Dr. Donovan indicating that such testimony was offered to show that the infant operated upon was of outstanding importance to the Jeffcott family, placing an out-of-the-ordinary responsibility upon the surgeon [Tr. pp. 100-101].

At the close of such discussions the Court ruled as follows:

"I shall permit the question to be answered and reserve the ruling as to admissibility." [Tr. p. 102].

Such preliminary question was answered under such reserved ruling.

The cross-examination along such line was then resumed [Tr. p. 106], with the following question:

"Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son, in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man?"

Appellants again objected [Tr. p. 106] and counsel for Dr. Donovan made the following statement to the Court, namely:

"Mr. Allen: I again assert that we make no claim against Robert Crawford Jeffcott, senior, or the

mother, but we maintain, as previously outlined to the court, that we have a right to go into the nature of the responsibility of this surgeon with regard to any peculiar or unusual importance that might have been placed by the family upon this particular child, and this question is foundational as to the natural line of inheritance which would be expected to follow in this family. That is the purpose of it." [Tr. pp. 106-107.]

The Court then commented upon such matter and ruled as follows:

"The Court: I suppose the importance to the plaintiff in this case of this testimony is the importance of the child to the parents." [Tr. p. 107] and

"The Court: Let the question be answered and the court will reserve the ruling. If this seems to the court remote and should not be considered, the court will disregard it altogether. The question may be answered with the understanding that the ruling is reserved." [Tr. p. 107].

The comments of the Court, to and including such ruling, indicate only fair and ordinary conduct in presiding at the trial.

Appellants do not refer to any incident or comment, thereafter to become a part of the record, which would even suggest the reversal of attitude which they mention.

There is no such incident or comment; and there was no such reversal of attitude.

At no time thereafter, did appellants request that the trial court make its reserved ruling. No request was made by appellants that any of such testimony be stricken and disregarded by the trial court.

There is nothing cited or referred to by appellants and there is nothing within the record to indicate that the trial court relied upon any of such evidence in making its findings and conclusions or in making and entering its judgment.

While it is not conceded that any of such evidence was immaterial and inadmissible, under all of the circumstances of the case, error would not lie, in the absence of some conclusive showing that the trial court relied thereupon.

In 26 *Ruling Case Law,* at page 1085, the rule is stated to be as follows:

> "* * * it is the general rule that error will not lie for the admission of irrelevant or incompetent evidence in a case tried before the court, without a jury, at least where it does not appear that the court relied upon the incompetent evidence in making its decree."

This rule was laid down by the Supreme Court of the United States at an early date.

Weems v. George, 14 L. Ed. 108, 13 How. 190.

Typical early state decisions are:

Frish v. Reigelman, 43 N. W. 1117, 75 Wisc. 499;

Maynard v. Locomotive Engrs. etc., 51 Pac. 259, 16 Utah 145.

The rule holds today, and is now the law in the State of Arizona, where it is held that it is to be assumed on review that a court hearing a case without a jury dis-

regarded incompetent evidence, where there is sufficient competent evidence to sustain the judgment.

Cooper v. Francis (1930), 285 P. 271, 36 Ariz. 273;

Little v. Brown, 11 P. (2d) 610, 40 Ariz. 206;

Glaspie v. Williams, 51 P. (2d) 254.

The reason for such rule has been rather well stated by the Supreme Court of the State of Nebraska, in the case of

Rupert v. Penner, 53 N. W. 598, 35 Neb. 587,

the language of which decision has been adopted by the editors of *Ruling Case Law,* as follows:

> "The reason for this rule has been said to be that the court must necessarily have an opportunity to examine each article of evidence offered, even for the purpose of rejecting it; and so the duty of acting and deciding the cause on the legal and relevant evidence selected from the mass that may have been introduced may be as well discharged by the court upon the final consideration of the cause as to pause in the course of trial to pass on the admissibility of the several matters offered in evidence."

26 *R. C. L.* 1086, note 12.

Furthermore, the appellants are in no record position to predicate error upon the trial court's receiving the evidence complained of by appellants on this appeal.

Where a court reserves its ruling on objection to evidence which has been offered, if the objection is not re-

newed and the court's attention directed to it again, the objection will be deemed waived.

> *Lee v. Farmers' Mut. etc.,* 241 N. W. 403, 214 Iowa 932;
>
> *Evans v. Heaton,* 233 N. W. 281, 57 S. D. 436;
>
> *Ross v. Mutual Life,* 191 N. W. 428, 154 Minn. 186, 31 A. L. R. 46.

Appellants, on pages 27 and 28 of their opening brief, quote from the remarks of the trial court, appearing on page 450 of the transcript.

The Court, in connection with an objection of appellants, commented as follows:

> "The Court: The relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in the matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, *is due for advances on the mortgage,* is the relationship of father and son, isn't that all?" (Italics are those of the briefer.)

Counsel for the appellee took such remarks of the Court to amount to a statement that the trial judge understood that the amount previously under discussion by Mr. Jeffcott [Tr. p. 448], "this sum, x due for advances on the mortgage" had been advanced to Mr. Jeffcott by his father; understood that the relation of creditor and debtor existed, in addition to the relation of father and son; intended to disregard the relationships within the Jeffcott family in all further regard; and desired that the line of examination be continued no further.

The question, to which appellants had objected, giving rise to such comment by the trial court, was thereupon withdrawn by appellee.

The correctness of appellee's interpretation of the comment by the trial court, above quoted, was further demonstrated, when the Court made this further comment:

> "The Court: I do not see the necessity of going into the ramifications. The implication is apparent as to the relationship and the establishment of the indebtedness. If there is some other purpose, all right." [Tr. p. 450].

Appellants state, page 28 of their brief, that this last comment demonstrates that the court had fallen a victim to some insiduous conduct of appellee.

The Court said, first, that "the implication is apparent." What implication? The implication that, since the mortgage lien on his property was in favor of his parents, the ultimate necessity of paying off the lien might be obviated by inheritance from the parents.

Counsel for appellants had just admitted such possibility [Tr. p. 449].

What then, immediately following such admission, could be so wrong with the Court stating that such implication was apparent?

The Court said further, in qualifying the implication which was apparent, that it was "as to the relationship and the establishment of the indebtedness."

It is apparent from appellants' brief that they wish this Court to construe that the trial court was referring to the establishment of the indebtedness between David C. Jeffcott, the defendant below, and Dr. Donovan, the plaintiff below.

Such is very clearly not the case. The trial court was merely continuing the prior comment, in which it was made very definite that the reference was to the indebtedness between the father and son, "for advances on the mortgage."

Counsel for appellants might be correct in the theory, voiced by novel expression, that the trial court could not "unring a bell," but appellants have wholly failed to make any showing that any bell had been rung.

There is nothing within the findings, in such regard, other than the facts that Mr. David C. Jeffcott had received financial aid from his parents, in setting himself up in the ranching business, and that he and Mrs. Jeffcott were indebted to his mother, upon a mortgage, for part of the advances. Such facts are supported by the evidence of Mr. Jeffcott. When considered in light of Mr. Jeffcott's testimony that the interest on such mortgage debt, since its inception during 1939 and shortly following receipt of Dr. Donovan's statement, had not been paid other than by further increases of the principal debt [Tr. pp. 447-448], such facts bear directly upon the issue as to the financial ability of the Jeffcott couple to pay for the services of Dr. Donovan.

III.

The division of appellants' opening brief numbered III is directed to the admission by the trial court of the testimony, by deposition, of Doctors Downes, Burdick and Beekman, as has to do with appellants' Specifications of Error V, VI and VII (Op. Br. pp. 10-14).

The position of appellants, in such respect, is that such expert witnesses were all permitted to answer a hypothetical question which did not contain assumptions to show the financial condition of the Jeffcotts, although each of such witnesses testified that he regarded that ability to pay was one of the elements customarily taken into consideration by eminent surgeons in determining their fees.

It is not correct that the financial ability was not submitted to such experts.

The hypothetical questions propounded to these experts, Downes, Burdick and Beekman, each contained an assumption in substantially the following language, namely:

> "and if it be further assumed that such agent or agents, then and thereupon and in the further course of such negotiations and pursuant to the further authority and instructions of such parents and for and on behalf of such parents, did advise the said Dr. Donovan that the said parents did not desire that such infant be taken to New York for such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of cost to them." [Tr. pp. 321-322, 355, 399-400.]

Such hypothetical questions contain further assumptions that Dr. Donovan came to Tucson, by air, and performed such operation, expressly relying upon such representations of such defendants [Tr. pp. 322, 355, 400].

What more could Dr. Donovan have been reasonably required to submit to such experts?

These experts were told to assume, in arriving at and expressing their opinions, that the Jeffcotts had advised Dr. Donovan, in the course of negotiating his employment, that their wishes were contrary to his in the matter of such proposed employment, that they wanted him to concede to their demands, regardless of cost to them, and that money was no object to them.

Every man is presumed, at law, to speak the truth. The conduct and dealings of every man, until the contrary is shown, is presumed to be open and honorable.

When these experts were given such hypothesis, concerning the employment negotiations, wherein the Jeffcotts represented that money was no object and that they wanted Dr. Donovan to come to Tucson for the operation, regardless of cost to them, such experts were entitled to assume that the Jeffcotts were telling the truth and were dealing with Dr. Donovan in an open and honorable manner.

Such a representation by the Jeffcotts can only be taken to mean that they had the ability and willingness to pay such reasonable fee as Dr. Donovan might charge, if he would change his plans and come to Tucson. No other construction can be placed upon the statement by Mr. Jeffcott, that money was no object, unless it be assumed that he was not telling the truth and that his intention was to mislead and take unfair advantage of Dr. Donovan.

The experts were privileged, even bound, to put such ordinary interpretation upon such representation by the Jeffcotts. They were unquestionably entitled to assume that the Jeffcotts had such self-asserted ability to pay.

The Jeffcotts, in inducing Dr. Donovan to make the trip to Tucson, stated that they had unlimited ability to pay. Dr. Donovan relied thereon. Dr. Donovan submitted such matters to his experts.

Dr. Burdick, on cross-examination, was asked the following question and gave the following answer:

> "Q. What did you know about the financial condition of the patient's parents? A. All I know is that Donovan said in the first place when they called up they said that money was no object." [Tr. p. 375.]

This testimony well indicates the natural and proper consideration given by such expert to such statement of inducement, made by Mr. Jeffcott.

The other three experts called on behalf of Dr. Donovan all indicated that their opinions were arrived at without knowing the financial condition of the patient's parents.

Had appellants seen fit to cross-examine on such point, it is entirely reasonable to assume that such experts, like Dr. Burdick, would have indicated that they regarded that the statement by Mr. Jeffcott, that money was no object, had obviated any consideration other than that the financial ability of such parents was ample.

Appellants, in such division III of their *Argument,* state that it is the general rule that all material facts must be contained in a hypothetical question, if the opinion of the expert is to be properly received.

Appellants' cited authorities do not appear to bear them out in such interpretation and assertion of the rule.

The rule is stated in *Jones on Evidence,* Third Edition, section 371, pages 559-560, as being that "it is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish, and fairly presents his claim or theory."

The writer of such text, at page 563, makes the further comment that:

> "If the hypothetical question properly presents the facts which the evidence tends to prove, and does not call upon the witness to reconcile conflicting evidence or to pass upon the merits of the case, a wide range may be given by the court, and a liberal discretion allowed as to its form."

The cases of *Dedonato v. Wells* and *Hahn v. Hammerstein,* cited by appellants on page 30 of their opening brief, lend no support to the statement of appellants as to the general rule.

In the former case, well known causes for a condition, in issue in such case, were expressly excluded from consideration by the expert, with the result that the court held that the question did not call for an opinion of a fair nature. In the second case, undisputed evidence was excluded and only impotent facts were assumed and submitted to the expert, causing the court to properly exclude the impotent and valueless opinion based thereon.

Even if it be taken, for the sake of argument, that the hypothetical question here complained of did not assume all of the facts bearing upon the financial ability of the defendants below, such omission of some of the facts would not render the opinions of the experts inadmissible.

The fact that an expert's judgment is not based on all of the facts of the case goes to its weight, rather than to its competency.

> 32 *C. J. S.* 220 (Evidence, Sec. 521);
>
> *Dunigan v. Appalachian Power Co.,* 33 Fed. (2d) 876, 68 A. L. R. 1393;
>
> *Mathiesen v. Smith,* 60 Pac. (2d) 873, 16 Cal. App. (2d) 479.

In the latter case, the court stated the rule to be as follows:

> "Then, again, hypothetical questions may be framed either upon all of the facts or any part thereof. An opinion not founded on all of the facts in the case goes to the weight of the evidence and not to its competency or materiality."

Dean Wigmore, in his usual exhaustive manner, states the rule in the following language, namely:

> "The question, on principle, *need not include* any particular number of facts; *i. e.,* it may include any one or more facts whatever, and *need not cover all the facts which the questioner alleges* in his case. The questioner is entitled to the witness' opinion on any combination of facts that he may choose. It is often convenient and even necessary to obtain that opinion on a state of facts falling short of what he or his opponent expects to prove, because the ques-

tioner cannot tell how much of the testimony the jury will accept; and if proof of the whole should fail, still proof of some essential part might be made and an opinion based on that part is entitled to be provided to the jury. For reasons of principle, then, and to some extent of policy, the natural conclusion would be that the questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis. Such is the orthodox doctrine as applied by most courts."

Wigmore on Evidence, Third Edition, Sec. 682 (b), page 807.

If opposing counsel thinks that facts have been omitted from the hypothetical question which are essential to forming a conclusion, his remedy is to put those additional facts before the witness on cross-examination.

11 *Ruling Case Law* 580.

An examination of the lengthy cross-examination, on behalf of the Jeffcotts, of Donovan's experts will indicate that appellants failed to submit to such experts any hypothesis presenting their view of their financial condition, or of their ability to pay.

Having so failed, the appellants cannot now maintain that the trial court should not have received the opinions of the experts because the hypothetical questions failed to include matters advanced by the appellants on their theory of showing their lack of financial ability to pay.

Dr. Donovan's theory of the case was that the Jeffcotts had represented to him that money was no object, that he had relied thereon, and that such representation

had a definite meaning, being that he was thereby entitled to charge what he considered a reasonable fee for his services under all of the prevailing circumstances [Tr. p. 259].

Dr. Donovan's theory was fairly submitted to each expert.

Dr. Burdick, being the only one of Donovan's experts that was cross-examined in such respect, indicated that he took such representation into account in arriving at his stated opinion, as indicating financial ability of the Jeffcotts [Tr. pp. 375-377].

While, as previously brought out, there is no justification for such an assumption, if it be assumed, for the sake of argument, that the other experts did not take such declaration of ability into consideration, the worst that can be said about such assumed situation is that their opinions are flexible, as to amount, because of lack of knowledge concerning financial ability.

Only once did counsel for the Jeffcotts submit to any of Dr. Donovan's experts any hypothesis concerning the Jeffcotts' ability to pay [Tr. pp. 376-377]. Such line of cross-examination was possibly abandoned, as undesirable to the Jeffcotts, after the following results with Dr. Burdick:

> "XQ. 141. You have not yet answered my question as to whether or not, assuming the facts that I have stated as to the net worth of the parents and their annual income of $5,000, that that would make any difference in your estimate of the value of Dr. Donovan's services? A. I would say that anybody with an income of $5,000 a year did not have any right to expect a fellow to fly down from New York to operate on their baby." [Tr. p. 377.]

IV.

Appellants' Specification of Error VIII is discussed in division IV of their opening brief on pages 31 to 33, inclusive.

Appellants say that Specification VIII speaks for itself.

If such be true, it speaks rather loudly of confusion on the part of appellants, as the one possibility, or "grabbing at straws," as the other.

Specification VIII, pages 14-20 of such brief, quotes much of the testimony, objections, argument and rulings relative to the effort, on behalf of Dr. Donovan, to show that the Jeffcott infant in question was the first grandson of a wealthy man, upon the theory that such showing would bear upon the special importance of such infant to its parents.

These quotations indicate that the theory of such offer was that such evidence tended to show the degree of responsibility undertaken by the surgeon in accepting and performing the employment to perform a delicate and extremely hazardous operation.

Counsel for appellants also quote, in such specification, from his cross-examination of Dr. Donovan, claiming that such quotation shows that Dr. Donovan did not take any unusual responsibility into account in determining the charge which he should make.

It is believed that all of the quoted cross-examination will convince this Court that Dr. Donovan had in mind only to deny any suggestion that his interest in saving the life of the child depended, to any degree whatever, upon the importance of the child to the parents. It is wholly reasonable to doubt that Dr. Donovan realized that he

was testifying that degree of responsibility, based on importance of or position in life of the patient, would never constitute part of the foundation for his charges.

When it is considered that Dr. Donovan testified that the element given second prominence by him in determining a fee was the responsibility which he had to assume in operating upon the particular patient [Tr. p. 198], it would seem quite strongly indicated that Dr. Donovan was thinking in terms of what effect the importance of the child would have upon his exercise of knowledge, skill and attention in an effort to save the child's life.

It is hardly open to question that this surgeon would exercise the same high degree of skill and care to save the life of an indigent child as he would to save that of a possible heir to millions. It is much to be doubted, however, that he intended to testify that such a difference of family importance, growing out of difference in financial position, would not be regarded as increasing his responsibility and would not be taken into account in determining what constituted a proper charge for his operation and services.

The appellants seem to take the position that the knowledge of the surgeon as to any such unusual responsibility would have had to exist at the time the operation was being performed if it were to be entitled to consideration on making the charge.

The fallacy of such position is very apparent.

It is wholly apparent that a surgeon of this importance might be called upon to operate upon some newborn, suffering from a condition similar to the one in issue, and perform the operation without having time to give any

thought to the family importance of the infant or under circumstances which might lead to the assumption that the family position was wholly ordinary. It is also possible that, after the operation had been performed, it would come to the attention of the surgeon that such infant was, in fact, heir apparent to the throne of England. It is wholly absurd to say that such a development could not be regarded by the surgeon as having tremenduously enhanced his responsibility or that it should not be taken into account in fixing his fee.

Be all of such as it may, there is nothing in the record to show or even to suggest that the trial court gave any consideration whatever to any of such offered evidence concerning the Jeffcott family situation.

In the absence of any finding upon such point, it must be assumed that the trial court did not base its conclusions and judgment upon any element of special or extraordinary responsibility of the surgeon as to the Jeffcott operation.

Appellants state, on page 32 of their brief, that they feel that it is apparent from the record of the case that Dr. Donovan made his charge with the thought in mind that the grandfather would pay his fee.

With due respect for the feelings of appellants, such statement by them is wholly without justification.

The only material on such point, within the entire record, is directly and pointedly to the contrary, such being the following excerpt from the transcript of the cross-examination of Dr. Donovan:

> "Q. Is it not a fact, doctor, that this statement and this charge you make—that the charge was made

and the statement was sent with the hope or expectation that the grandfather would take care of the bill? A. No, sir. No, sir, positively not." [Tr. p. 259.]

Not only is the record devoid of any evidence or showing to support such feeling by appellants, if such they have, but there is no finding to support the same.

When it be considered that it is not pertinent to show even that other surgeons would have been willing to perform the same operation for less than the fee charged,

Kline v. Blackwell, 63 Fed. (2d) 897,

and that the reasonableness of a physician's charge cannot be established by proof of what he charged another person in a similar case,

L. R. A., 1917-A, p. 1269; and

Marshall v. Bahnsen, 57 S. E. 1006,

it readily becomes apparent that no appropriate purpose could have prompted appellants to cite, on page 32 of their brief, what they term to be "cases which show comparative fees which have been awarded."

The general weakness of the appellate position of the Jeffcotts is indicated by this resort to insinuation that this Court should not sustain an award of $7,500.00 in this case, with its mass of evidence justifying such award, because some court, at some place, many years ago and under wholly disrelated circumstances, made lesser award for some type of medical or surgical attention.

V.

The facts of this case, which highly support the findings, conclusions and judgment of the trial court, are fairly simple.

Baby Jeffcott was born at Tucson, Arizona, during March, 1939. A few days thereafter it became apparent that he suffered a complete obstruction of the intestine and required major surgery. The attending physicians recommended or suggested Dr. Donovan, practicing in New York City, as being a pediatric surgeon of outstanding experience and qualification for the performance of the operation. Arrangements were made that the baby be flown to New York for such surgical attention. The parents, appellants herein, decided that they preferred to have the operation performed at Tucson, since such procedure would inconvenience fewer people. In order to be further assured that Dr. Donovan would consent to come to Tucson, they represented that money was no object. Dr. Donovan, relying upon such representation, left his New York practice and flew to Tucson, where he performed a very successful and satisfying operation, of a delicate and dangerous nature, without which the Jeffcott infant would have died. Dr. Donovan's fee was not made the subject of contract or discussion. About a month after the operation, he presented a statement of his fee, making a charge of $12,500.00 for his services, without additions for his travel expense. Appellants refused to pay such fee, representing that, while they were worth approximately $100,000.00, net [Tr. p. 9], they were without "net annual income" from their ranch and were unable to pay such fee. Having paid $2,500.00 on account of such demand, as an asserted salve to their

consciences, they then refused to pay anything more and this action was brought.

Dr. Donovan showed his qualifications; the circumstances surrounding his employment, including the representation that money was no object and his reliance thereon; the circumstances concerning his performance of the service; the indications of ability of the Jeffcotts to pay, including the apparent ability of the Jeffcotts to spend heavily in connection with the care of the infant and its mother, the lack of indications of concern about expense and the signed admission of Mr. Jeffcott that he and his wife were worth approximately $100,000.00 at a time shortly after the operation; that three experts, all being eminent surgeons of New York City, regarded that his services were worth between $10,000.00 and $15,000.00; and that a Tucson pediatrician, formerly having practiced in New York and being one of the attending physicians at Tucson and having been the assistant in performance of the operation in question, regarded that the operation was worth in excess of ten thousand dollars.

Dr. Donovan testified that he regarded that his service, under the prevailing circumstances, was reasonably worth the sum of twelve thousand five hundred dollars.

He then rested his case.

The Jeffcotts then introduced evidence that they were actually of a net worth of approximately $80,000.00 at the time of the operation; that such worth consisted of a cattle ranch, from which they had no net income; and that three physicians of Tucson, Arizona, one of them practicing no surgery whatever, believed that from $1500.00 to $2000.00 constituted a reasonable fee for the services of Dr. Donovan.

In addition, the Jeffcotts showed that, for the five years beginning with 1937, they had been financially able, through operation of their ranch and borrowing, to expend approximately $44,000.00 for the purchase of cattle and approximately $83,000.00 for ranch expense; and that, for the four years, beginning with 1938, in like manner, they had been financially able to and had made personal expenditures exceeding $40,000.00, about $650.00 of which had been dividend income.

The Jeffcotts then rested.

The trial court then found that a fee of $7,500.00 was reasonable for the service in question and awarded judgment for the unpaid balance amounting to five thousand dollars.

Some portions of the testimony, heretofore referred to, indicate that Dr. Donovan tended to rely upon the representation of the Jeffcotts that money was no object, upon the indications that they were not concerned about the amount of his fee and upon the indications that they were not making any effort to keep down expense, rather than upon a definite ascertainment of their worth and income.

There is no law cited by appellants and none known to appellee which would require Dr. Donovan, under such circumstances, to prove financial ability of the Jeffcotts to pay.

To say that some courts hold that a surgeon may consider ability to pay, in making his charge, and that he may show financial condition of his patient, in his action for his fee, is one thing. To say that he is required to consider or to show financial condition, is an entirely different matter.

This is pointedly indicated by one of the cases cited by appellants, wherein the California Court of Appeals, during 1931, after considering at length the conflicting holdings as to the admissibility of evidence as to financial condition of the patient, commented in this manner, namely:

> "Irrespective, however, of the question of materiality of evidence showing financial condition of the patient, there is ample testimony in the record to support the full allowance made by the jury for the reason that several witnesses testified that, regardless of the financial condition of Haas, Zumwalt's services were reasonably worth $1500 to $2500."
>
> *Zumwalt v. Schwarz,* 297 Pac. 608, 112 Cal. App. 734.

All of the evidence, bearing upon financial condition of the Jeffcotts, can be regarded as never having become a part of the record of this case, and there would still be ample testimony to support the judgment, since at least two of the experts for Donovan testified that, regardless of financial condition of the Jeffcotts, Donovan's fee should exceed $10,000.00 [Tr. pp. 152, 405].

The testimony of all experts for Donovan was entitled to special consideration by the trial court.

Dr. Donovan had shown himself to be [Tr. pp. 162-179] and was admitted to be [Tr. p. 148] one of the most eminent pediatric surgeons in this country. His eminence had been acquired in practice at New York City.

Two of his experts were also pediatric surgeons who had gained and who held eminence in practice at New York City. The third was an eminent surgeon of such city.

Their testimony falls into that valuable class of evidence mentioned by the Eighth Circuit Court of Appeals, in a case involving an action for fees of specialized patent attorneys, the following being said:

> "Here the litigation is different. It is not local, but national, and is conducted mainly by specialists, and their judgment is the best evidence as to what is reasonable for such services."

and

> "Litigation of this kind is national, and not local. To confine testimony in such a case to what is usual in the community is simply to deny one of the valuable sources of information. *Knowledge of the usual compensation for such service can only be learned from those who live in the centers where such litigation is most frequent,* and to deny a litigant to produce the testimony of persons having that kind of qualification is to substitute theory for experience." (Italics are those of the briefer.)
>
> *Coca-Cola Co. v. Moore,* 256 Fed. 640.

The California court of appeals, in the case of *Citron v. Fields,* cited by appellants, states an elementary and universally recognized rule in the following manner:

> "The rule is well settled that, in considering the testimony, it should be remembered that the construction to be given it must be that which will support the judgment of the court, if reasonable conclusions based thereon warrant, and any conflict of the testimony must be resolved against the appellant."

Where there is evidence to support the judgment of the trial court, the appellate court will not assume that it is better qualified to determine the issues of fact, limiting its inquiry to alleged error of law and to determining that the action of the trial was not wholly unwarranted by the evidence.

If there is evidence to support the judgment, it will not be disturbed.

The presumptions are that all of the action of the trial court was proper.

Such propositions are too elementary to necessitate citations of authority.

The appellee submits that the record of this cause contains a generosity of competent evidence to support an award and judgment substantially in excess of those given to Dr. Donovan; that the appellants have not carried the burden of showing wherein error of law was committed by the trial court; and that appellants have wholly failed to show that the trial court received or considered any improper and prejudicial testimony or evidence.

There is no resemblance of basis for the reducing of the award of the trial court or for the granting of a new trial.

The judgment of the trial court should be affirmed.

Respectfuly submitted,

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